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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD E. GEORGE,

Defendant and Appellant.

D047826

(Super. Ct. No. SCD179831)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

Richard E. George appeals his convictions of first degree murder during the commission of a robbery (Pen. Code,¹ §§ 187, subd. (a), 190.2, subd. (a)(17)), two counts of robbery (§ 211) and one count of aggravated assault (§ 245, subd. (a)(1)). True findings were made that he had four prison prior convictions. (§§ 667.5, subd. (b), 668.) He was sentenced to a determinate term of seven years and an indeterminate term of life without possibility of parole.

¹ All statutory references are to the Penal Code unless otherwise specified.

George contends the court erred by admitting evidence of a prior choking incident, an eyewitness identification that was tainted by an unduly suggestive photo line-up, and DNA evidence. He also contends there was insufficient evidence to corroborate the testimony of an accomplice and cumulative error warrants reversal of his convictions. We affirm the judgment.

FACTS

Assault and Robbery of Killpack

George was Bertha Ledesma's boyfriend and pimp. She had been a prostitute since she was 15-years-old and was a crack addict. George drove Ledesma to locations where she worked as a prostitute and he parked nearby. After each "date," Ledesma would go to his car and give him the money she had earned. Ledesma was afraid of George, and at one point, she wrote a letter stating that if she were found dead, to investigate George because he had tried to kill her by strangling her. From August 2003 to January 2004, George and Ledesma stayed at motels, with George paying in cash. George sold drugs and he was also a driver for Amvets in El Cajon.

On Saturday night, January 3, 2004, George drove Ledesma to one of her usual prostitution locations by the Adult Emporium on Main Street in Chula Vista. At about 2:15 a.m., her third "date" that night was Fred Killpack. Killpack had spent the evening at a cowboy western bar in Mission Valley where he had two or three light beers. He was on his way home and he pulled off the freeway in Chula Vista, intending to get something to eat. He changed his mind when he saw Ledesma standing in front of the Adult Emporium, and he decided to "pick her up." She agreed to give him oral sex for

\$20 and directed him to a street behind the Adult Emporium. Because Ledesma complained about being warm, Killpack rolled down his window about four inches.

Once they were parked, Killpack paid Ledesma and reclined his seat as she undid his pants. She put a condom on him and started to give him oral sex. Killpack became nervous when a vehicle with its lights on pulled up behind them. Ledesma told him to relax, that there were a lot of cars that came into the area, but he was uncomfortable and asked her to leave. Ledesma continued to try to reassure him while he continued to ask her to leave. The vehicle left in less than a minute.

Shortly thereafter, Killpack saw George walking towards his car from the corner. Ledesma refused to leave and Killpack thought he was being "set up." He started the car's engine and Ledesma began punching, scratching and biting his face. The next thing Killpack noticed was George standing at the driver's side window. George told Ledesma to throw the car keys out of the car, which she did. George reached into the car and choked Killpack into unconsciousness. George took Killpack's wallet, which Killpack had taken out during the struggle and offered to George. They left Killpack unconscious in his car.

While George and Ledesma were driving away, George told Ledesma to take everything of value out of the wallet. She removed a gas credit card and threw the wallet out the window. She later gave the credit card to George.

Killpack regained consciousness about an hour or so later and noticed his wallet was missing. He looked for his car keys, but did not find them. He used his cell phone to get a ride home from his ex-wife. He did not immediately report what had happened

because he was embarrassed. But, on Monday, January 5, after learning about a murder occurring in the same general area, Killpack went to the police and provided a description of his assailants. He was shown a photographic line-up that did not include Ledesma's photograph but did include the photograph of another prostitute the police believed might be involved. He did not make a positive identification. Killpack took the police to the crime scene where he found his car keys in the dirt near a fence.

On January 13, the police showed him two photographic line-ups, one containing Ledesma's photograph, the other George's photograph. Killpack spent two to three minutes looking at Ledesma's line-up and tentatively identified her based on her acne and hair. In contrast, Killpack "instantaneously" identified George as the assailant, stating "that's the guy." He was 100 percent positive in his identification. Killpack also identified George at trial.

When George and Ledesma were arrested on January 14, George had receipts in his car for gas station purchases made with Killpack's credit card. One of the receipts was from a gas station near the Amvets store in El Cajon where George worked. Records for Killpack's credit card indicated the credit card had been used on the morning of January 4 at a gas station near the motel where Ledesma and George were staying. In addition, Ledesma testified she was with George on January 6 when she used Killpack's card to buy gas.

Robbery and Murder of Thomas Duray

After robbing Killpack, George and Ledesma returned to the motel room. George told Ledesma to get ready to go back out and refused to let her go alone. Ledesma

changed her clothes and they drove to an area on 32nd Street, in San Diego, arriving about 5:00 a.m. Ledesma went to the corner where she was picked up by one of her "regulars," Tom Duray; she had met with him twice before. They drove around the corner and he paid her \$30. He reclined his seat and while she was putting a condom on him, she stole his cell phone and put it in her pocket. She began orally copulating him. Less than 10 minutes later, George reached into the car, tried to grab Duray's throat and told Ledesma to throw the car keys out the window. She threw the keys out the window. She bit Duray on the thigh. Duray pleaded with George not to kill him, telling him he had three children and offered to take him to his bank and give him money, but his pleas had no impact on George. At one point Ledesma heard a female voice coming from Duray's cell phone, yelling for her father and asking what was wrong. Ledesma turned off the phone.

Eventually, George got into the back seat of Duray's car and strangled Duray until he stopped fighting. George took Duray's wallet from the glove compartment. He and Ledesma left the scene and as they were driving away, George told Ledesma to take everything of value out of the wallet. He asked her about the condition of the wallet, and she told him it looked brand new. He told her he needed a new wallet, transferred the contents of his wallet to Duray's wallet and threw away his old wallet.

Not long after they returned to the motel room, George received a phone call, spoke briefly and hung up. Ledesma, suspecting the call was from one of George's girlfriends, grabbed the phone and accidentally hit George in the head with the phone.

He was upset and hit her in the jaw, breaking it. Phone records showed a three minute call was made to George's cell phone at 6:43 a.m. on January 4th.

When the police investigated the crime scene, they found the driver's seat fully reclined. A gallon bucket of water in the back seat had been knocked over and Duray's body had been dragged between the front seat and the console and halfway into the right rear passenger seat. There were signs of a struggle, including pieces of the ignition on the floorboard, damage to the underside of the steering wheel, the presence of Duray's shoe outside the vehicle, and bruises on his left shin and foot.

Duray died due to manual strangulation. His hyoid bone was broken, an injury that usually does not occur except in traffic accidents or manual strangulation. There was evidence that he had struggled; typically a person takes about 15 minutes to die from strangulation. Even if Duray had only been strangled into unconsciousness and then the strangulation had stopped, he still could have died due to a fractured bone and deep neck hemorrhaging, "injuries that you can't fix quickly." The medical examiner testified Duray's injuries were consistent with Ledesma's testimony of what had occurred.

From Duray's car, the police recovered a used condom and collected samples from smudges on the right rear window for DNA analysis. An expert testified the outside of the condom contained a mixture of DNA and the statistical analysis indicated an extremely high statistical probability the DNA belonged to Duray and Ledesma.

The samples from the rear window of Duray's car contained lower levels of DNA, with only some DNA markers having sufficient quantity for typing. The expert testified that in one of the samples, a DNA marker with sufficient quantity for typing indicated it

was a mixture of DNA from at least two people. Duray and Ledesma were excluded as contributors of the DNA. Killpack and George were included as contributors. The expert testified the statistical analysis indicated one out of two African-Americans, Caucasians and Hispanics had the same DNA marker as found in the sample. As to the other sample from the rear window of Duray's car, there was also a mixture of DNA from at least two persons. Duray and Ledesma were excluded as contributors of the DNA. Killpack could not be excluded or included as a contributor. George could have been a contributor. The statistical analysis indicated that one out of nine African-Americans could have been a contributor. George is African-American. In other words, 11 percent of African-Americans could have contributed to the DNA sample.

Duray's son testified Duray had recently purchased a new wallet, which looked similar to the wallet recovered from George.

Duray's daughter testified that on January 4, 2004, at about 6:12 a.m., her phone rang. When she answered the phone, she heard only a rustling sound. She said, "Hello, hello?" She then clearly heard a "very deep, very strong" man's voice say, "Where's your wallet? Where's your keys?" She thought "something was going down." She heard more rustling sounds and then hung up the phone. Because "something didn't seem right," she wrote down the time of the phone call and then called her father because she was worried. His cell phone was turned off and she left a message.

Defense

George presented evidence that Ledesma was a habitual drug user and liar and was high on the day of the crimes. She had not told her friends that George was her pimp, rather, she told them he was her boyfriend.

George's mother testified that between August 2003 and January 14, 2004, George lived off and on in her house. She remembered he came by her house on Saturday, January 3 to check her car, as he did every Saturday morning. She also specifically remembered him coming to her house about 6:00 a.m. on January 4 because she had to make a phone call at 6:00 a.m. to La Jolla about a bread pick-up, and while she was on the phone, George entered the house.

An expert on eyewitness identification testified factors that reduce the rates of correct identification include high levels of stress when a person is frightened, alcohol use, divided attention, and cross-racial identification. The expert testified that when a photo line-up contains "personal irrelevant cues" such as jewelry or clothing or is in some way significantly different from the other photographs, a witness may focus more on that photograph and be influenced in their selection. A victim's or witness's certainty of their identification is not necessarily a reliable predictor of whether an identification is correct. During cross-examination, the expert stated one of the best predictors of whether an identification is accurate is "scan duration." When an individual "pops out immediately" with an identification, "[t]hat tends to have the highest rate of accuracy."

Rebuttal

A police detective testified that he interviewed George's mother on January 20, 2004. She told him she had no idea where George was on the weekend of the robbery and murder and that he had been gone the entire weekend.

DISCUSSION

I

Admission of Prior Choking Incident

George contends the court erred in admitting evidence he had choked Ledesma on a prior occasion because the evidence was of limited probative value and highly prejudicial.

As a general rule, evidence that a defendant committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1147.) Evidence of prior criminal acts is admissible if it is relevant to prove some fact such as motive, opportunity, intent, preparation, plan, or knowledge. (Evid. Code, § 1101.)

"[E]vidence of uncharged misconduct ' "is so prejudicial its admission requires extremely careful analysis" ' and to be admissible, such evidence ' "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352." ' [Citation.] Thus, '[t]he probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of

misleading the jury.' " (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The prejudice that section 352 " 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jurors, motivating them to use the information not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.

On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. (*People v. Carter, supra*, 36 Cal.4th at p. 1147.) A trial court will not be found to have abused its discretion unless it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice." (*People v. Lawley* (2002) 27 Cal.4th 102, 158; *People v. Roldan* (2005) 35 Cal.4th 646, 688.)

The trial court found the choking evidence was relevant to show that Ledesma's motive to initially lie to the police was her fear of George. The court found the probative value of the evidence outweighed any prejudicial effect.

Below, George's counsel conceded Ledesma's fear of George was relevant to explain why she initially lied to the police but argued that instead of admitting Ledesma's letter stating that if she were found dead, the police should investigate George because he had tried to kill her by choking her in the past, the court should allow Ledesma to testify she was afraid of George and even that he tried to kill her "without getting into . . . the choking issue." On appeal, George stresses Ledesma's fear of George "was not an ultimate fact in the case and was not in dispute." (*Italics omitted.*) This argument, however, overlooks the fact that Ledesma was a key witness and her credibility was sharply disputed. Since George did not testify, attacking Ledesma's credibility was key to his defense and, among other things, he pointed out that initially Ledesma had not told the police about George's involvement. The fact Ledesma's letter was written before the crimes occurred, and was recovered during a search of her belongings before she was arrested, made it especially probative of her fear of George and to explain why she lied to the police prior to George's incarceration. Evidence of Ledesma's mental state, that is, her fear of George, was a distinct purpose from showing George had propensity to commit the charged crimes.

Nor do we find the evidence unduly prejudicial. The act of choking Ledesma was not likely to inflame the jury against George, especially in light of the facts relating to the charged crimes, which involved the application of a vicious degree of violence, causing

serious injury to one victim² and death to the other. There is no reasonable probability the jury's verdict was the result of being inflamed against George by Ledesma's letter or based on reliance on propensity evidence rather than based on the evidence presented to support the charges.

II

Photographic Line-up

George contends the photographic line-up shown to Killpack was unduly suggestive. His sole basis for arguing the procedure was unduly suggestive is that his photograph had a green background while the other photographs had blue backgrounds.

The California Supreme Court has indicated that differences in the background colors of photographs in a lineup do not, in and of themselves, render a lineup suggestive. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217; see also *People v. Holt* (1972) 28 Cal.App.3d 343, 349-350, overruled on other grounds in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, fn. 6 [procedure not unduly suggestive due to mixture of black-and-white and color photographs in photographic array].) We find the photo array not unduly suggestive.

We also note that in this case, Killpack's identification of George in the photo line-up was "instantaneous"; as soon as the detective placed the line-up before Killpack, he immediately identified George as his assailant. George's eyewitness expert testified such

² Killpack testified that he had internal bleeding, difficulty breathing, pain when he talked, and his injuries took four to six weeks to heal completely.

immediate identifications, that is, identifications with extremely short scan durations, tend to be the most accurate identifications. The expert also testified that identifications tend to be more reliable if the witness has been earlier shown a photo array not containing the defendant and had selected no one as the suspect. In this case, Killpack had been shown a photographic array containing a prostitute who the police suspected might have been involved in the robbery and he did not identify any of the photographs as showing a person involved in the offense.

In sum, we find no basis for reversal based on George's claim the photographic line-up was unduly suggestive.

III

Admission of DNA Evidence

George contends the DNA evidence taken from Duray's car should have been excluded because the statistical calculations were unreliable and the probative value of the evidence was outweighed by a danger of undue prejudice.

Before trial, George challenged the DNA evidence, contending the DNA testing and statistical analysis were scientifically unreliable and the evidence should be excluded under Evidence Code 352 because its probative value was outweighed by the prejudicial effect. The court conducted an Evidence Code section 402 hearing where Patrick O'Donnell, a supervising criminalist from the San Diego Police Department (the police department), testified.

O'Donnell testified the police department uses the Profiler Plus test. This type of test, known as a Short Tandem Repeat test (STR) looks at nine specific locations or

markers on the DNA molecule for repeated sequences of DNA, assigns a numerical value based on the number of repeats and refers to the sequence of repeats as an "allele." Thus, if a sequence repeats 14 times at a particular marker, it is referred to as a 14 allele. Since people inherit half their DNA from each parent, the testing could reveal two different alleles at a marker, for example, a 13 allele from the mother and a 14 allele from the father. Or a person could inherit the same allele from both parents, for example, a 14 allele, so DNA testing of a sample from that person would contain only the 14 allele. A person who inherits the same alleles from both parents is a "homozygote" at that DNA location. The STR test also looks at DNA to determine whether the individual was male or female. Once a DNA profile is developed based on results of the STR test, it is subjected to statistical calculations to determine how common the profile is within different ethnic communities. O'Donnell testified both the STR tests and the statistical methodology used by the police department are accepted by the scientific community.

The two samples at issue here — 30 and 31 — were taken from the rear window of Duray's car and appeared to be smudges most likely made by a hand. Both samples contained only low levels of DNA. The police department requires the level of DNA in a sample to be above a certain threshold level. Alleles that are found but are below the threshold level are described as "trace" amounts. The police department takes a conservative approach, sets a higher threshold than some other laboratories, and does not conduct a statistical analysis using alleles that are present only in trace amounts.

DNA analysis becomes more complex when there are multiple contributors to a DNA sample. The alleles present in sample 30, including those at trace levels, indicated

the sample was a mixture of DNA from at least three people. The alleles present in sample 31, including those in trace amounts, indicated that it was a mixture of DNA from at least two people.

Because of the low levels of DNA in samples 30 and 31, the laboratory was able to use only one of the nine markers in each sample. In sample 30, three alleles were above the threshold amount at the genetic marker that was used — the 13, 14, and 15 alleles — and were used in the statistical computation. George was a homozygote who had inherited the 14 allele from both his parents and therefore it was possible he could have contributed the 14 allele. One out of two African-Americans, Caucasians or Hispanics could have contributed the 14 allele in sample 30.

In sample 31, the 13, 14, and 15 alleles were detected, but only the 14 allele was above the threshold level and therefore was used in the statistical analysis. One out of nine African Americans, including George, could have contributed the 14 allele to the sample.

O'Donnell testified that it was not possible to determine how the 13, 14, and 15 alleles were "paired up." Thus, it was possible the DNA could have been contributed by one person who had the 13 and 14 alleles at that location and by another person who had 14 and 15 alleles at that location, a hypothetical situation that would exclude George who had inherited only the 14 allele from his parents.

In response to the court's questions, O'Donnell stated that even when the trace levels of alleles at all the markers were taken into account, George would not have been excluded as a contributor of the DNA in the samples.

The prosecutor presented the DNA evidence through the San Diego Police Department criminalist, Janine Miller. Miller testified the samples contained low levels of DNA contributed by multiple persons. She testified that sample 30 had a low-level mixture of DNA from more than one person, and contained the 13, 14, and 15 alleles above the threshold at the marker, that George could not have contributed the 13 or 15 alleles but could have contributed the 14 allele, which occurs in one of two people in the Caucasian, African-American, and Hispanic populations. She stated it was not possible to determine whether the persons who contributed those 13, 14, and 15 alleles were homozygotes or heterozygotes. She stated that George could not be excluded as a possible contributor and that is why he was listed as a possible contributor.

As to sample 31, she stated that the 14 allele at the genetic marker that was used is relatively common in the human population and occurs in one out nine people in the African-American population. She stated the 14 allele was the one most commonly occurring in the African-American population and was the second most commonly occurring in the Caucasian and Hispanic populations.

To be admissible, scientific evidence must meet certain requirements of acceptance within the scientific community, the correct scientific procedures must have been utilized, and the proffered expert must be qualified to give an opinion. (*People v. Kelly* (1976) 17 Cal.3d 24, 30.) The fact that different experts may disagree about the conclusions to be drawn from certain evidence does not render the scientific methodology unreliable and inadmissible. (*People v. Thang Van Bui* (2001) 86 Cal.App.4th 1187, 1196.) It is the province of the jury to decide whether an expert's opinion is reasonable

and to determine the weight to be given to expert testimony. (*People v. Smithey* (1999) 20 Cal.4th 936, 966.) " 'Once the court acts within its discretion and finds the witness qualified, . . . the weight to be given the testimony is for the jury to decide.' " (*People v. Cooper* (1991) 53 Cal.3d 771, 814.) Specifically, questions "of whether proper procedures were used to test the DNA and to determine the profile's statistical significance is a matter going to admissibility, not weight." (*People v. Brown* (2001) 91 Cal.App.4th 623, 654.)

DNA evidence, like other evidence, is subject to exclusion under Evidence Code section 352 if the probative value of the evidence is outweighed by a danger of undue prejudice or by a danger of misleading the jury. As we explained in part I, the prejudice that section 352 " 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors.' " (*People v. Zapien, supra*, 4 Cal.4th 929, 958.)

We review the court's decision to admit expert testimony and its determination under Evidence Code section 352 for an abuse of discretion. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Carter, supra*, 36 Cal.4th at p. 1147.)

Here, DNA analysis used in this case — the STR method — has been held to be generally accepted within the scientific community. (See *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1149; *People v. Smith* (2003) 107 Cal.App.4th 646, 665.) It has also been held that the statistical analysis used in this case, that is, the comparison of a DNA profile to the relevant ethnic population has received general acceptance within the

scientific community. (*People v. Smith*, at p. 665.) This comparison has been held necessary to give meaning to the value of the DNA evidence to the jury. As stated by the court in *People v. Venegas* (1998) 18 Cal.4th 47, 63-64, "The question properly addressed by the DNA analysis is . . . this: Given that the suspect's known sample has satisfied the 'match criteria,' what is the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample? . . . A greater probability . . . would tend to favor the suspect by increasing the probability that one or more other persons has a DNA profile matching the evidentiary sample." (Fn. omitted.)

George's contention that the statistical analysis was "unreliable" does not attack the basic methodology or the scientific underpinnings of the DNA analysis or the calculation of the statistical probability. Rather, George argues the statistical analysis was unreliable since the samples contained a mixture of DNA from multiple persons and it could not be definitively stated whether George had contributed or not contributed to the DNA mixture. As he points out, in the samples, the 13, 14, and 15 alleles were detected and he would have been excluded as a contributor if the DNA had been contributed by two heterozygote persons, for example, by one person with the 13 and 14 alleles and another person with the 14 and 15 alleles. He contends this scenario — where George would be excluded as a contributor because he was a homozygote with only 14 alleles — "was not taken into consideration in the statistical calculation . . . [that] instead assumed one of the contributors was a homozygote 14, thereby resulting in a statistical frequency for . . . George being a contributor."

This argument goes to the weight of the evidence, not its admissibility. As O'Donnell explained at the Evidence Code section 402 hearing, the statistical analysis "simply [addresses] . . . the percent of the population that doesn't have a 14 allele, and, therefore, can absolutely be excluded as a contributor to the sample." The statistical analysis showing the percentage of the population of African Americans who could have contributed to the samples was proper evidence for the jury to consider; it was relevant information. It was not unduly prejudicial, that is, it was not unduly inflammatory nor was it likely to mislead the jury. It was clearly presented to the jury that this was a limited DNA analysis, complicated by the low levels of DNA and the multiple contributors. The jury was fully apprised that it was not possible to determine whether the 14 allele had been contributed by a homozygote and that it was possible the DNA had been contributed by heterozygotes with 13, 14 and 14, 15 alleles, a situation that would exclude George as a donor.

George also contends that the evidence was unreliable because O'Donnell admitted that experts from different laboratories could reach different opinions about the statistical probability that an individual had contributed DNA to a sample. This argument does not further George's argument that the evidence should have been excluded. The experts disagreed only because they used differing thresholds for determining when an allele should be factored into a statistical analysis. The fact that experts may differ does not render testimony inadmissible. If that were so, then we would never have trials with competing experts. Juries are allowed to hear and to weigh competing expert testimony. George was free to bring in his own expert to dispute the analysis of the prosecution's

witness or, as he did both at the evidentiary hearing and at trial, use cross-examination to expose differing expert views. Further, the evidence indicated that the San Diego laboratory was conservative in setting thresholds and other laboratories, using lower thresholds, would have computed a higher statistical probability that George contributed to the DNA found on Duray's car.³ In other words, other expert opinions might have been more damaging to the defense than the expert opinion offered here.

In sum, this is not a situation where the evidence was scientifically unreliable or of no evidentiary value. We find no abuse of discretion in the court's determination that the jury could hear the DNA evidence and determine what weight to give it.

IV

Sufficiency of Corroboration of Accomplice Testimony

George contends the testimony of his accomplice, Ledesma, was insufficiently corroborated and therefore could not be used to support the verdicts. He contends without her testimony, the evidence was not sufficient to support the verdicts of guilty beyond a reasonable doubt.

"A conviction can be based on an accomplice's testimony only if other evidence tending to connect the defendant with the commission of the offense corroborates that

³ There was evidence that there were trace levels of DNA at other markers that were "a perfect fit" with George's DNA.

testimony. (§ 1111.)" (*People v. McDermott* (2002) 28 Cal.4th 946, 985-986.)

"Corroboration must be more than just a casting of suspicion on a defendant" and "mere opportunity to commit a crime is not sufficient corroboration." (*People v. Boyce* (1980) 110 Cal.App.3d 726, 737.) The necessary corroboration of an accomplice's testimony " 'may be established entirely by circumstantial evidence. [Citations.] Such evidence "may be slight and entitled to little consideration when standing alone. [Citations.]" ' [Citation.] 'Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." [Citation.]' " (*People v. Zapien, supra*, 4 Cal.4th 929, 982; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1203-1204.) "It is enough that the corroborative evidence tends to connect defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth." (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1303.)

(A) *Killpack Robbery and Assault*

George's argument Ledesma's testimony was not sufficiently corroborated as to the Killpack robbery and assault is based on the premise Killpack's identification testimony should have been excluded because the photographic line-up was unduly suggestive. He also contends Killpack's identification was unreliable, noting that such factors as high stress can diminish the accuracy of an identification.

As we explained in part II, the photographic line-up was not unduly suggestive and, moreover, Killpack's instantaneous identification of George and experience of

having viewed a photo array where neither of the assailants was present tended to show his identification was likely to be accurate. Killpack's eyewitness testimony George was the robber and assailant amply corroborated Ledesma's testimony. Furthermore, Ledesma's testimony was corroborated by the presence of gas station receipts from the use of Killpack's credit card in George's car and evidence indicating gasoline purchases on the credit card were made at locations close to where George lived and worked. The fact that Ledesma sometimes used George's car did not render this evidence wholly uncorroborative; it was instead a factor for the jury's consideration in determining her credibility.

(B) *Duray Robbery and Murder*

George contends the only evidence, independent of Ledesma's testimony, that linked him to the Duray robbery and murder was the DNA evidence. He contends this evidence "was very weak, inconclusive, amounted to nothing more than a mere suspicion [he] might have been involved, and therefore, did not corroborate Ledesma's testimony."

The DNA evidence, admittedly, was not strongly compelling evidence. However, the DNA evidence was not the only physical evidence corroborating Ledesma's testimony. Duray's car keys were located outside where the car had been parked, thus corroborating Ledesma's testimony she had thrown the keys out the window. Duray's daughter testified she received a call from Duray's phone where she heard rustling noises and a man demanding money. Her testimony not only corroborated Ledesma's story that Duray's cell phone received a call from a woman who was calling for her father during the incident but also was independent evidence there was a man involved in the robbery.

Additionally, when arrested, George had a new wallet on him that was similar to the wallet stolen from Duray.

Furthermore, George could be connected to the Duray robbery and murder based on the striking similarities to the Killpack robbery and assault. Both incidents occurred on the same night, within a few hours of each other, and within a short distance of each other. Indeed, Killpack testified he was prompted to report the crime because of the location of the murder. Killpack's eyewitness identification established that Ledesma was present during his robbery and assault, that she was a prostitute, had directed him to recline his seat and she used a condom. Duray was found with his seat reclined. A condom was found containing DNA both from Duray and Ledesma, thus corroborating that Ledesma was involved in the Duray robbery and murder. In both incidents the car keys were a short distance away from where the cars were parked, the windows of the car were partially rolled down, the victim was manually strangled, and the victim's wallet was taken. There was also evidence, from Ledesma as well as other witnesses, that George was her boyfriend.

Under these circumstances, given Killpack's identification of George as his attacker, Ledesma's presence at both incidents, her relationship to George, the timing and location of the incidents, and the strong similarities of how the robberies and assaults occurred, a jury could reasonably infer that Ledesma's accomplice in both incidents was the same man and that man was George. In other words, even without Ledesma's

testimony or the DNA evidence, there was sufficient evidence to establish George's identity as the robber and assailant.

V

Cumulative Error

George contends that even if any single error does not merit reversal, reversal is warranted to the cumulative effect of the errors. Since we have found no errors were committed, we need not address this claim.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.